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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 LEONARDO DUQUE,

11 Plaintiff,

No. CIV S-05-0183 KJM

12 vs.

13 JO ANNE B. BARNHART,  
14 Commissioner of Social Security,

15 Defendant.

ORDER

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17 Plaintiff seeks judicial review of a final decision of the Commissioner of Social  
18 Security (“Commissioner”) denying applications for Disability Income Benefits (“DIB”) and  
19 Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act  
20 (“Act”), respectively. For the reasons discussed below, the court will deny plaintiff’s motion for  
21 summary judgment and the Commissioner’s cross-motion for summary judgment, but will  
22 remand for further proceedings.

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I. Factual and Procedural Background

In a decision dated July 23, 2004, the ALJ determined plaintiff was not disabled.<sup>1</sup> The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review. The ALJ found plaintiff has severe chronic lower back pain following lumbar laminectomy, but this impairment does not meet or medically equal a listed impairment; plaintiff's subjective complaints are credible only to the extent they are supported by the record evidence; prior to October 29, 2003, plaintiff could perform light work; plaintiff cannot perform his past relevant work; using grid rule 202.17, plaintiff was not disabled prior to October 29, 2003; and plaintiff became disabled on October 29, 2003. Administrative Transcript

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<sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the Social Security program, 42 U.S.C. § 401 *et seq.* Supplemental Security Income ("SSI") is paid to disabled persons with low income. 42 U.S.C. § 1382 *et seq.* Under both provisions, disability is defined, in part, as an "inability to engage in any substantial gainful activity" due to "a medically determinable physical or mental impairment." 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R. §§ 423(d)(1)(a), 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The following summarizes the sequential evaluation:

Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.

Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.

Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P, App.1? If so, the claimant is automatically determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.

Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled. \_\_\_\_\_

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

The claimant bears the burden of proof in the first four steps of the sequential evaluation process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential evaluation process proceeds to step five. Id.

1 (“AT”) 21-22. Plaintiff contends the ALJ incorrectly determined the onset date of plaintiff’s  
2 disability and improperly discredited his subjective complaints.

### 3 II. Standard of Review

4 The court reviews the Commissioner’s decision to determine whether (1) it is  
5 based on proper legal standards under 42 U.S.C. § 405(g), and (2) substantial evidence in the  
6 record as a whole supports it. Copeland v. Bowen, 861 F.2d 536, 538 (9th Cir. 1988) (citing  
7 Desrosiers v. Secretary of Health and Human Services, 846 F.2d 573, 575-76 (9th Cir. 1988)).  
8 Substantial evidence means more than a mere scintilla of evidence, but less than a  
9 preponderance. Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996) (citing Sorenson v.  
10 Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)). “It means such relevant evidence as a  
11 reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402  
12 U.S. 389, 402, 91 S. Ct. 1420 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S.  
13 197, 229, 59 S. Ct. 206 (1938)). The record as a whole must be considered, Howard v. Heckler,  
14 782 F.2d 1484, 1487 (9th Cir. 1986), and both the evidence that supports and the evidence that  
15 detracts from the ALJ’s conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir.  
16 1985). The court may not affirm the ALJ’s decision simply by isolating a specific quantum of  
17 supporting evidence. Id.; see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If  
18 substantial evidence supports the administrative findings, or if there is conflicting evidence  
19 supporting a finding of either disability or nondisability, the finding of the ALJ is conclusive, see  
20 Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an  
21 improper legal standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d  
22 1335, 1338 (9th Cir. 1988).

### 23 III. Analysis

#### 24 A. Onset of Disability

25 Plaintiff alleges his disability began on March 2, 2001. AT 89. Plaintiff  
26 underwent back surgery on May 24, 2001. AT 89, 177-178. As noted, the ALJ found plaintiff

1 became disabled on October 29, 2003 but was not disabled prior to that date. AT 22. Plaintiff  
2 challenges the basis of the ALJ's determination of the onset date.

3           The ALJ must assist the plaintiff in creating a complete record so that the onset  
4 date of disability can be determined, rather than inferring a date that would result in a denial of  
5 benefits. Armstrong v. Comm'r of Social Security, 160 F.3d 587, 589-90 (9th Cir. 1998); SSR  
6 83-20. In finding plaintiff was disabled only as of October 29, 2003, the ALJ relied on the  
7 assessments of plaintiff's treating physician, Dr. Millar, and a consultative examining  
8 neurologist, Dr. Serrano. AT 16, 279-281, 297-302. Although Dr. Millar's assessment is dated  
9 October 29, 2003, no onset date of disability is noted. Cf. AT 279 (onset of diagnosis of disease  
10 underlying disability indicated as May 2001). Similarly, Dr. Serrano's consultative report, dated  
11 April 18, 2004, addresses plaintiff's disability as of the date of the exam and provides no  
12 retrospective analysis. AT 301-302. In concluding that these physician's reports supported a  
13 finding that plaintiff was disabled only after October 29, 2003, the ALJ set forth a rather detailed  
14 description of the medical reports and noted "[t]hroughout the treatment records prior to October  
15 2003, the plaintiff's physical examination was essentially normal, the [plaintiff] did not report  
16 any difficulties with radiating pain and he was managed conservatively with pain medications."  
17 AT 18.

18           In reaching this conclusion, the ALJ glossed over or ignored significant contrary  
19 evidence. For instance, in discounting treating physician Dr. Reiser's opinion in February 2002  
20 that plaintiff could not work a regular job, the ALJ ignored a report of radiating pain in May  
21 2001 as well as positive straight leg testing on October 29, 2001. AT 193-197; see also AT 171,  
22 198, 233. In a medical report dated March 12, 2003, Dr. Millar indicated plaintiff was  
23 permanently disabled with an onset date of 1997.<sup>2</sup> AT 17, 46, 278, 287. While acknowledging at  
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25           <sup>2</sup> The ALJ misconstrues these records to mean Dr. Millar thought plaintiff only  
26 temporarily disabled. The form indicating plaintiff was permanently disabled is dated the same

1 least two doctors considered plaintiff disabled enough during 2001 to receive disabled person's  
 2 placards, the ALJ appears to have ignored the significance of this factor in evaluating the onset  
 3 date of disability. AT 18, 229, 237. Although the ALJ noted Dr. Reiser's concerns about  
 4 prescribing narcotics, the ALJ failed to note the significant pain medications prescribed by Dr.  
 5 Reiser within a short period of time after Dr. Reiser temporarily declined to prescribe further  
 6 medications. AT 18, 227, 230, 282, 283, 286, 287- 288, 290-291. The ALJ also failed to  
 7 recognize that the opinions of the state agency physicians were prospective only and issued in  
 8 August and November 2001, within several months after plaintiff's surgery. AT 18, 183-190,  
 9 191. The ALJ also appears to have failed to take into account Dr. Millar's opinion that plaintiff's  
 10 disability was based on a failed surgery and that the surgery had taken place over two and a half  
 11 years prior to the date of onset determined by the ALJ. AT 279.<sup>3</sup>

12 Given the findings in the medical record, which appear to have been ignored by  
 13 the ALJ, and the lack of any medical opinion regarding the onset date of disability itself, further  
 14 evidence must be developed in this regard. SSR 83-20;<sup>4</sup> see Morgan v. Sullivan, 945 F.2d 1079,

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 16 as plaintiff's visit with Dr. Millar in which an earlier form indicating temporary disability  
 17 apparently was discussed.

18 <sup>3</sup> Dr. Millar notes a principle diagnosis including "failed back syndrome," which the  
 19 court understands to mean the same thing as "failed back surgery syndrome," indicating a failure  
 of surgery to correct plaintiff's back problems.

20 <sup>4</sup> Plaintiff's disability appears to be of a nontraumatic origin, although exacerbated by an  
 injury in May 2001. AT 179, 181, 298. SSR 83-20 provides in pertinent part:

21 In disabilities of nontraumatic origin, the determination of onset  
 22 involves consideration of the applicant's allegations, work history,  
 23 if any, and the medical and other evidence concerning impairment  
 severity. The weight to be given any of the relevant evidence  
 24 depends on the individual case. . . . Medical reports containing  
 descriptions of examinations or treatment of the individual are  
 basic to the determination of the onset of disability. The medical  
 evidence serves as the primary element in the onset determination.  
 25 . . . With slowly progressive impairments, it is sometimes  
 impossible to obtain medical evidence establishing the precise date  
 26 an impairment became disabling. . . . In such cases, it will be

1 1082-83 (9th Cir. 1991) (when medical evidence concerning the onset date is ambiguous, the  
 2 ALJ must seek the assistance of a medical advisor); DeLorme v. Sullivan, 924 F.2d 841, 848 (9th  
 3 Cir. 1991) (stating that when "the medical evidence is not definite concerning the onset date and  
 4 medical inferences need to be made, SSR 83-20 requires the administrative law judge to call  
 5 upon the services of a medical advisor").

#### 6 B. Credibility

7 Plaintiff also contends the ALJ improperly assessed his credibility and that of his  
 8 wife. The ALJ determines whether a disability applicant is credible, and the court defers to the  
 9 ALJ's discretion if the ALJ used the proper process and provided proper reasons. See, e.g.,  
 10 Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1995). If credibility is critical, the ALJ must make  
 11 an explicit credibility finding. Albalos v. Sullivan, 907 F.2d 871, 873-74 (9th Cir. 1990); Rashad  
 12 v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990) (requiring explicit credibility finding to be  
 13 supported by "a specific, cogent reason for the disbelief").

14 In evaluating whether subjective complaints are credible, the ALJ should first  
 15 consider objective medical evidence and then consider other factors. Bunnell v. Sullivan, 947  
 16 F.2d 341, 344 (9th Cir. 1991) (en banc). If there is objective medical evidence of an impairment,  
 17 the ALJ then may consider the nature of the symptoms alleged, including aggravating factors,  
 18 medication, treatment and functional restrictions. See id. at 345-47. The ALJ also may consider:

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20 necessary to infer the onset date from the medical and other  
 21 evidence that describe the history and symptomatology of the  
 22 disease process. . . . In some cases, it may be possible, based on  
 23 the medical evidence to reasonably infer that the onset of a  
 24 disabling impairment(s) occurred some time prior to the date of the  
 25 first recorded medical examination, e.g., the date the claimant  
 26 stopped working. How long the disease may be determined to  
 have existed at a disabling level of severity depends on an  
 informed judgment of the facts in the particular case. This  
 judgment, however, must have a legitimate medical basis. At the  
 hearing, the administrative law judge (ALJ) should call on the  
 services of a medical advisor when onset must be inferred.

(1) the applicant's reputation for truthfulness, prior inconsistent statements or other inconsistent testimony, (2) unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment, and (3) the applicant's daily activities. Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996); see generally SSR 96-7P, 61 FR 34483-01; SSR 95-5P, 60 FR 55406-01; SSR 88-13. Work records, physician and third party testimony about nature, severity and effect of symptoms, and inconsistencies between testimony and conduct also may be relevant. Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir. 1997). A failure to seek treatment for an allegedly debilitating medical problem may be a valid consideration by the ALJ in determining whether the alleged associated pain is not a significant nonexertional impairment. See Flaten v. Secretary of HHS, 44 F.3d 1453, 1464 (9th Cir. 1995). The ALJ may rely, in part, on his or her own observations, see Quang Van Han v. Bowen, 882 F.2d 1453, 1458 (9th Cir. 1989), which cannot substitute for medical diagnosis. Marcia v. Sullivan, 900 F.2d 172, 177 n.6 (9th Cir. 1990). "Without affirmative evidence showing that the claimant is malingering, the Commissioner's reasons for rejecting the claimant's testimony must be clear and convincing." Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

As discussed above, the ALJ ignored significant clinical findings, which in fact supported plaintiff's complaints. The ALJ also misstated the record when indicating plaintiff's pain was treated conservatively. AT 20. In fact, plaintiff's pain was so severe that he underwent a discectomy, neural foraminotomy and partial laminectomy. AT 177-178. As opined by plaintiff's treating physician, this surgery failed in eliminating plaintiff's pain. AT 279. In light of the serious misstatement of the medical record, the court cannot find the ALJ's credibility determination was based on permissible grounds.

The remaining question is whether to remand this case to the ALJ or to order the payment of benefits. "The decision whether to remand the case for additional evidence or simply to award benefits is within the discretion of the court." Stone v. Heckler, 761 F.2d 530, 533 (9th

1 Cir. 1985). In this case, there remains the question of the date of onset of plaintiff's disability,  
2 which will require the assistance of a medical advisor.

3 For the foregoing reasons, this matter will be remanded under sentence four of 42  
4 U.S.C. § 405(g) for further development of the record and further findings addressing the  
5 deficiencies noted above.

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. Plaintiff's motion for summary judgment is denied;  
8 2. The Commissioner's cross-motion for summary judgment is denied; and  
9 3. This matter is remanded for further proceedings consistent with this order.

10 DATED: September 27, 2006.

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13 UNITED STATES MAGISTRATE JUDGE  
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